Filed 12/22/14 P. v. Smith CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARCUS RANDEL SMITH, Defendant and Appellant.	A139544 (San Mateo County Super. Ct. No. SC075695)

Defendant Marcus Randel Smith appeals a judgment convicting him of a number of domestic violence offenses and sentencing him to a total term of 40 years to life in prison. Defendant challenges a number of evidentiary rulings, as well as the sufficiency of the evidence in support of his convictions. We shall affirm.

Factual and Procedural Background

Defendant was charged with nine counts: kidnapping (Pen. Code, § 207, subd. (a)),[1] oral copulation by force (§ 288a, subd. (c)(2)), assault with a deadly weapon, a baseball bat (§ 245, subd. (a)(1)), assault by force likely to cause great bodily injury (§ 245, subd. (a)(4)), forcible false imprisonment (§ 236), child endangerment (§ 273a, subd. (a)), two counts of criminal threats (§ 422), and one misdemeanor count of battery on a person the defendant was dating (§ 243, subd. (e)(1)). The information alleged defendant used a deadly weapon, a bat (§ 12022, subd. (b)), during the commission of the

[1] All statutory references are to the Penal Code unless otherwise noted.

second criminal threat. For sentencing purposes, the information also alleged defendant had suffered three prior serious felony convictions (§§ 1170.12, subd. (c)(2), 667, subd. (a)), and two prior prison terms (§ 667.5, subd. (b)).

Evidence of the following facts was presented at trial:

The Current Offense

The victim testified that she met defendant through a mutual friend in October 2011 and began a sexual relationship with him in January or February 2012. On February 24, 2012, the victim and her then three-year-old son went with defendant to his mother's house in Daly City. Sometime that morning, after arriving at his mother's house, defendant accused the victim of cheating on him and called her a whore. The argument escalated and defendant pushed her down on his bed and began choking her. He ripped off her clothes and attempted to sexually assault her. The victim's son was in the room at the time of the assault. Defendant directed the child to bite the victim on the arm. The child bit his mother twice, causing her to scream, and defendant stopped the attack briefly. However, he resumed the attack shortly thereafter. He told the victim he was going to kill her. He said neither of them would leave the house alive, and her son would be the only survivor. The victim was scared he might kill her. The assault was briefly interrupted again, this time by a knock at the door. When defendant returned from answering the door, he forced the victim to orally copulate him. A second knock on the door interrupted the assault again. During the course of the assault, the victim attempted to call the police on her cell phone, but defendant "snatched" it from her.

When defendant went to answer the door the second time, the victim dressed herself, grabbed her son, put him in his stroller and ran out of the house. Defendant caught up with her at the street corner, grabbed her son from the stroller and headed back to the house. She followed, trying to get her son back. Defendant told her "get back in the house. Get back in the house. You're making a scene out here in front of my mother's house." The victim said she went back into the house because she had no choice but to follow her son.

A few minutes later a cable service technician, Henry Yee, knocked on the door and defendant let him in. Yee was nervous and said he would come back later. The victim asked him for help, pleading "Please don't go. Please don't leave. Please call the police, because he's trying to kill me."

After Yee left, defendant got a baseball bat. He grabbed it with both hands, lifted it over his head and brought it down toward the victim's head, stopping short before hitting her. He told her she was not going to get out alive, and he would take her to hell. She was terrified and believed defendant would make good on his threat. When defendant put the bat down, she ran out the front door leaving her son behind. She ran next door and used the neighbor's phone to call the police.

When the police arrived, defendant came outside to meet them. Defendant had three to four scratches on his back and additional scratches on his upper arms, which could have been caused by fingernails. Defendant's right kneecap also was bruised. The victim had two bite marks on her arm and "redness to the front of her neck area." She told the officer about the service technician who had been at the house.

Yee, the service technician, testified that he parked on the street in front of the house and knocked on the front door. When no one responded, he knocked again. As he was getting back in his van, defendant appeared by his van door. He said he was the customer and "ordered" Yee to go in the house. He seemed agitated. As Yee began collecting his tools, a woman came out the front door pushing her son in a stroller. The woman had reached the curb when defendant went after her and picked up the boy, removing him from the stroller. The woman was "frantic, trying to leave." He "could see that she wanted to leave but . . . defendant would not allow her to leave." The woman pleaded to leave but defendant would not release the boy. Defendant put the boy on his shoulders and walked back into his house. The woman followed. Defendant told her to be quiet and get in the house. Yee followed both of them into the house.

Once inside the house, defendant told Yee he was having problems with his video service. As Yee walked to the living room he could hear and see defendant and the woman arguing. She wanted to leave. She reached up and tried to get the boy, but

defendant used his weight to keep her away. The woman said, "I got to go. I don't want to stay." Yee was uncomfortable with the conflict and told defendant he should reschedule the appointment. The woman begged Yee not to leave. Yee apologized, but said he could not get involved. Yee left after spending 10 to 12 minutes in the house.

Evidence of Prior Domestic Violence

The jury also heard testimony from defendant's former girlfriend regarding a prior incident of domestic violence. The former girlfriend testified that, in 2006, she and defendant were in a romantic relationship and she was expecting his child. During the evening of April 3, 2006, she and defendant were arguing about, among other things, whether she had another boyfriend. At some point, they decided to go to defendant's mother's house in Daly City. Defendant hit her on the back of her head twice as they were preparing to go and then punched her numerous times in the stomach while they were in the car. During the trip, defendant was talking irrationally. He said her unborn child could not be his because he was sterile. He said he was the devil for what he was about to do. He said that when she died she would go to heaven, but he was going to hell. Defendant pulled into a parking lot and then hit her with a closed fist over her eye and punched her in the lip. She told defendant she wanted to call her parents and to go home but he said "no" and took her phone away. Defendant drove her to an ATM machine and demanded she withdraw $1,200. Once out of the car, she tried to run away. Defendant chased her and when two men responded to her cries for help, defendant told them to leave and they backed away. The police arrived as defendant was dragging her back into his car. Defendant was very confrontational when the police arrived. He kept saying he was the devil, and his name was Satan. The police had to use tasers to subdue and arrest him. Based on this incident, defendant was convicted of criminal threats and domestic violence.

In the present case, the jury found defendant not guilty of child endangerment and not guilty of assault by means of force likely to cause great bodily injury, but guilty of the lesser included offense of misdemeanor simple assault. The jury found defendant guilty of all other charges. With the exception of one prior prison term allegation that was

dismissed by the prosecutor, the jury found all of the sentence enhancement allegations true.

The trial court sentenced defendant to a total term of 40 years to life. It imposed a 25-year-to-life sentence for the kidnapping charge under the "Three Strikes" law and three consecutive five-year sentences for the three serious felony priors (§ 667, subd. (a)). Sentences for all other convictions were stayed pursuant to section 654. The court struck the punishment for the prior prison terms (§ 667.5, subd. (b)).

Defendant timely filed a notice of appeal.

Discussion

1. *Substantial evidence supports defendant's kidnapping conviction.*

"Every person who forcibly, or by any other means of instilling fear . . . takes . . . any person . . . into another part of the same county, is guilty of kidnapping." (§ 207, subd. (a).) The victim's movement is forced ". . . where it is accomplished through the giving of orders which the victim feels compelled to obey because he or she fears harm or injury from the accused and such apprehension is not unreasonable under the circumstances.' [Citations.]" (*People v. Majors* (2004) 33 Cal.4th 321, 326–327.) In *People v. Felix* (2001) 92 Cal.App.4th 905, 910, the court held that "[a] defendant is guilty of kidnapping a parent where he or she takes the parent's child and the parent accompanies the defendant because of fear for the child's safety." The court explained, the defendant took the parent's daughter to force [the parent] to go with him. He admitted using the child as a tactic to achieve that result. He violated the restraining order and said it would not keep him away. This shows [the defendant] knew [the parent] would not voluntarily go with him. [The parent] got in his car because she feared for her daughter's safety. She requested, at least a dozen times, that [the defendant] take her home. But he refused and insisted that she listen to him. Although he made three stops, [the parent] could not run away because she knew [the defendant] was watching her. From these facts the jury could reasonably infer [the defendant] was guilty of kidnapping. [Citations.]" (See also *People v. La Salle* (1980) 103 Cal.App.3d 139, 145-146 [jury could conclude the mother's entry into the defendant's car was compelled by force where defendant lured

the mother's three-year-old daughter into his car and told the mother " '[i]f you want her, you have to get in the car with me' "], disapproved on another ground by *People v. Kimble* (1988) 44 Cal.3d 480, 496 & fn. 12.)

Here, the jury was instructed that to find defendant guilty of kidnapping, it must find that "defendant took, held, or detained [the victim] by using force or by instilling reasonable fear." The prosecution argued defendant instilled reasonable fear in the victim when he took her son from her and refused to give him back. The prosecutor stated the kidnapping charge "specifically relates only to when they made it outside, when [the victim] made it outside with her son, and defendant took her son away and effectively forced her back into the home, because he had her son."

On appeal, defendant argues, under the circumstances of this case, the victim could not reasonably have felt compelled to follow his order. He further argues there is no reasonable basis to believe he would harm the child if the victim disobeyed him. Defendant notes the victim testified he loved her son, had a "very good relationship" with the child, never threatened the child, and told the victim that only the child would survive. He argues further that, unlike in *People v. Felix, supra,* 92 Cal.App.4th 905 and *People v. La Salle, supra,* 103 Cal.App.3d 139, there was no reasonable basis to believe that the child would be taken to some unknown place where the parent could not find him. He also argues, had the victim "asked Yee to call the police or ran next door to make her own call, her son would still have been in defendant's house when police arrived."

Whatever might have befallen the child if the victim had stayed outside to call the police, it was neither implausible nor unreasonable for the victim to have felt compelled to follow her son into the house. By this point in the altercation, defendant was enraged and had demonstrated a willingness to involve the child in his violent behavior. Substantial evidence supports the jury's finding that the victim feared for the safety of her child and that such apprehension was not unreasonable under the circumstances.

2. *Substantial evidence supports defendant's conviction for assault with a deadly weapon.*

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Section 245, subdivision (a)(1) increases the punishment when a person commits an assault with a deadly weapon. An assault does not require a specific intent to cause injury; rather an "assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*People v. Williams* (2001) 26 Cal.4th 779, 790 (*Williams*).)

Defendant claims, because he intended to stop his swing before the bat hit the victim's head, he did not commit an act which by its nature would probably and directly result in the application of force. We disagree.

People v. Wright (2002) 100 Cal.App.4th 703 (*Wright*) is instructive. In that case, the defendant "drove his pickup truck close to persons with whom he had contentious relations," but claimed he was only trying to frighten them. (*Id*. at p. 705.) On another occasion, he got into an altercation with a man that ended with the defendant driving at high speed directly toward the man and making two close passes. (*Id*. at p. 708.) Following *Williams*, *supra*, 26 Cal.4th 779, the court affirmed the assault convictions, concluding "the jury was required under the instruction given to find this conduct would probably and directly result in the application of physical force upon [the victims] and there is substantial evidence to support that finding." (*Wright*, at p. 725.)

The fact that defendant intended to stop his swing before he hit the victim is no different from the situation in *Wright*, where the defendant intended to stop his car before hitting his victims. There is sufficient evidence defendant deliberately swung the bat at the victim and the natural and probable result of swinging a bat at a person is the application of physical force to that person. Defendant's subjective intent is irrelevant because no intent to injure is required. There was ample evidence to support defendant's conviction of assault with a deadly weapon.

3. *Substantial evidence supports the finding that defendant's prior assault conviction was a serious felony within the meaning of section 1192.7.*

The jury found that defendant's conviction in 1990 for a violation of section 245, subdivision (a)(1) qualified as a strike under the Three Strikes law (§ 1170.12). To qualify as a strike, the jury was required to find that defendant's prior offense was a serious felony as defined in section 1192.7, subdivision (c). (§ 1170.12, subd. (b)(1).) At the time of defendant's conviction in 1990, section 245, subdivision (a)(1) provided that "Every person who commits an assault upon the person of another with a deadly weapon . . . or by any means of force likely to produce great bodily injury" is guilty of a felony. (Stats. 1989, ch. 1167, § 1, p. 4526.) "A conviction for assault with a deadly weapon under section 245, subdivision (a)(1) . . . qualifies as a serious felony whether or not the defendant was convicted as a direct perpetrator or as an aider and abettor." (*People v. Banuelos* (2005) 130 Cal.App.4th 601, 605 (*Banuelos*).) However, the other variant of section 245, subdivision (a)(1), assault by means of force likely to produce great bodily injury, is not a serious felony "unless it also involves the use of a deadly weapon or actually results in the personal infliction of great bodily injury. [Citations.]" (*Banuelos*, at p. 605.)

Introducing certified documents from the record of a prior court proceeding is a common means of proving the fact and nature of a prior conviction. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065.) " '[The] trier of fact is entitled to draw reasonable inferences from certified records offered to prove a defendant suffered a prior conviction . . . .' [Citations.]" (*Id.* at p. 1066.) A "court may look to the entire record of the conviction" to determine the nature of a prior conviction allegation; but if the record fails to reflect "any of the facts of the offense actually committed, the court will presume that the prior conviction was for the least offenses punishable . . . ." (*People v. Guerrero* (1988) 44 Cal.3d 343, 352.) Therefore, "[o]n an appellate challenge to a finding that a prior conviction was a strike, where the prior conviction is for an offense that can be committed in multiple ways, one or more of which would not qualify it as a strike, and *if it cannot be determined from the record that the offense was committed in a way that*

would make it a strike, a reviewing court must presume the offense was not a strike." (*People v. Watts* (2005) 131 Cal.App.4th 589, 596.)

Here, the certified copy of the information submitted to the court shows that defendant was charged in count 1 with assault "with a deadly weapon, to wit: a rock, and by means of force likely to produce great bodily injury." A great bodily injury enhancement under section 12022.7 was also alleged with respect to count 1. The superior court minutes state that defendant pleaded no contest to "245(a) PC" and the order of commitment states that defendant was convicted of "245(a)(1) PC." Defendant's signed plea agreement indicates that he was charged in count 1 with violating "PC 245(a) . . . [with] 12022.7" and that he pleaded no contest under count 1 to "PC 245(a)" in exchange for, among other things, the dismissal of the "remaining counts and allegations."

Defendant argues that there is no basis on this record to determine whether he pled guilty to assault with a deadly weapon *or* assault by means likely to produce great bodily injury. Defendant is correct that some courts have deemed clerical notations on the abstract of judgment too ambiguous to constitute substantial evidence that the prior assault qualified as a serious felony. (See *People v. Rodriguez* (1998) 17 Cal.4th 253, 261–262 [notation " 'ASLT GBI/DLY WPN' " is too ambiguous to support prior serious felony finding]; *Banuelos, supra,* 130 Cal.App.4th at pp. 605–606 [notation " 'ASSAULT GBI W/DEADLY WEAPON,' " too ambiguous to support prior serious felony finding]). The record in this case, however, includes more than merely notations in the order of commitment.

As the Attorney General argues, "the fact that appellant pleaded no contest to count 1, Penal Code section 245, subdivision (a)(1), which was specifically charged in the information as an assault with a deadly weapon, to wit, a rock, *and* by means of force likely to produce great bodily injury, supports the reasonable inference that appellant committed and was convicted of one act, an assault with a deadly weapon by means likely to cause great bodily injury." The allegations in the information do not merely track the statute. If they did, it would read, "assault . . . with a deadly weapon . . . *or* by

any means of force likely to produce great bodily injury." The use of the conjunctive "and" reflects an intent to charge defendant with something more than the statutory language. The conjunctive specifies that defendant's prior conviction involved violations of both forms of the statute and thus qualified as a serious felony. Accordingly, substantial evidence supports the jury's finding that his 1990 conviction qualified as a strike under the Three Strikes law.

4. *The trial court did not err in allowing testimony regarding defendant's prior act of domestic violence.*

Evidence Code section 1101, subdivision (a), generally provides that "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Evidence Code section 1109, subdivision (a)(1) provides, however, that "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." Thus to be admissible under Evidence Code section 1109, "the trial court must still determine, pursuant to Evidence Code section 352, whether the probative value of the evidence is substantially outweighed by the probability the evidence will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. [Citation.]" (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1233 (*Brown*).)

Defendant contends that the trial court erred in admitting evidence of his prior act of domestic violence against his former girlfriend. He claims that "[t]he probative value of [her] testimony was outweighed by its unfair prejudice." We review the trial court's determination under Evidence Code section 352 for abuse of discretion. (*Brown*, *supra*, 192 Cal.App.4th at p. 1233.)

The evidence of defendant's domestic violence against his former girlfriend is relevant and highly probative of his guilt in the present action. Though not identical, the

incidents are sufficiently similar in important respects to support the admission of the prior incident. (*People v. Johnson* (2010) 185 Cal.App.4th 520, 532 (*Johnson*) [“Section 1109 was intended to make admissible a prior incident ‘similar in character to the charged domestic violence crime, and which was committed against the victim of the charged crime or another similarly situated person.’ [Citation.]”].) In both incidents, defendant exhibited a willingness to physically assault his girlfriend when angry because he thought she was seeing someone else. In both incidents, he took away the victims’ phone so they could not call for help and used force and intimidation to keep them from escaping when they attempted to flee. The differences identified by defendant, that he threatened to kill the unborn child in the first incident but not the child in the second, and that he resisted arrest following the first incident but cooperated with the police following the second incident, are not so significant so as to render the evidence inadmissible.

Contrary to defendant’s argument, the prior act was no more inflammatory than the present incident, so that the potential for prejudice did not outweigh the clear probative value of the evidence. (*Johnson*, *supra*, 185 Cal.App.4th at p. 534, fn. 11 [“Courts are primarily concerned where the past bad act was ‘more inflammatory’ than the offense for which the defendant is on trial. [Citation.]”].) While the prior incident involved a pregnant woman, the current incident also involved a child. One incident is no more egregious than the other in that respect. Likewise, while the wounds inflicted in the first incident possibly were more severe, they were not so extreme that the jury was likely to be unfairly influenced by admission of the evidence. We find no error in the admission of the evidence of prior domestic violence.[2]

5. *Defendant was not denied his right to present a defense.*

At trial, defendant attempted to introduce evidence that at the time of the prior act of domestic violence against his former girlfriend he was hearing voices, had stopped

[2] Defendant’s argument that Evidence Code section 1109 is unconstitutional, which he acknowledges was rejected in *People v. Falsetta* (1999) 21 Cal.4th 903, is preserved for further review.

taking his medication and claimed to be suffering from schizophrenia. The prosecutor objected to the admission of this evidence, arguing the defense was attempting to "backdoor" a mental health defense. The court agreed that any evidence of "mental health illness" was irrelevant and inadmissible under Evidence Code section 352. The court also prohibited the defense from arguing to the jury the prior assault was driven by "a mental health episode."

Defendant argues that the court abused its discretion in excluding this evidence because the "[m]ental health evidence was relevant not as a defense, but to support [his] argument the circumstances of the prior assault . . . were so different as to have minimal or no tendency to prove [defendant] was predisposed to commit the alleged acts against [the victim in this case]." He argues the exclusion of this evidence also violated his constitutional right to present a defense guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

As the Attorney General notes, the evidence shows that defendant pleaded either no contest or guilty to the conviction for domestic violence. Defendant cannot now introduce evidence of mental illness to prove he was not culpable of the prior crime due to his mental state. Contrary to defendant's argument on appeal, that is precisely what he attempted to do by introducing this evidence. He argues "[e]vidence, which shows a defendant's prior domestic assault was an aberration, is . . . relevant to rebut the inference the prior crime shows the defendant has a trait of character to commit domestic violence." But to argue the prior act was an aberration because it was "the product of mental illness, and not a predisposition to commit acts of domestic violence," is to argue that he was not culpable in the prior incident, which is directly contrary to his plea. The court did not err in excluding the proffered evidence.

Disposition

The judgment is affirmed.

_____
Pollak, Acting P. J.

We concur:

_____
Siggins, J.

_____
Jenkins, J.